Supreme Court, U.S.
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No. 09-679

IN THE
Supreme Court of the United States

GAIL PARKERSON
PETITIONER

v.

RICHARD MCMURTREY, SANDRA MCMURTREY, ERNIE'S WRECKER & BODY SHOP, INC., & JOHN DOE NO. 1 AS GARLAND COUNTY, ARKANSAS
RESPONDENTS

On Petition for Writ of Certiorari
To the Arkansas Court of Appeals

Petitioner's Reply Brief

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ARGUMENT

Petitioner Parkerson disagrees with most all statements made in Respondents' Statement of the Case, as well as in their Argument.

The Respondents' statement that the "Judge had, two years previously, entered an appearance as a prosecutor in a separate criminal action against Petitioner in district court," was very misleading. It was in the Circuit Court, not District Court, before Judge Smitherman. And the date the prior case was dismissed against Petitioner was May 19, 2004, while this civil case, with Petitioner as Plaintiff, began March 26, 2004.

The Respondents also stated that Petitioner did not offer into evidence a legal description or survey, or testimony showing the boundaries of the property which she claimed by adverse possession. However, the Judge refused to allow Petitioner to offer into evidence the showing of the boundary lines of the property of her claim by granting her Motion to Inspect the property. While the Respondents, according to their response to Petitioner's Motion, did not want the trial court to view the property. This included the major part of the property, not contested by Garland County, Arkansas, which was the old road bed, where Petitioner's 1978 Corvette was parked, before Respondents took it and destroyed it. The County Judge for Garland County, Arkansas testified at trial to going and viewing the property himself and submitting a sworn affidavit, that Garland County, Arkansas was not contesting Petitioner's claim of the old road bed,

(where her car had been parked since before 1980), as belonging to Petitioner as a part of her front yard. Even the Respondents' main witness by deposition, Mrs. Conroy, (Respondents' predecessor) supported the fact, that Petitioner's 1978 Corvette was parked in the old roadbed, along with other cars and visitors' cars that parked there as well. And the Respondent McMurtrey also testified, as was also noted in discovery, that Respondent was not claiming any of the old road bed. Petitioner had her surveyor there to testify in court as well as her own testimony in regard to the boundary lines, as well as her survey, and individuals testifying mowing within those boundary lines. Meanwhile, the surveyor for the Respondents, McMurtreys, stated in Court, he did not know where their boundary lines were located. Over Petitioner's Objection at trial, the trial judge abused his discretion by granting Respondents quiet title to property, they claimed beginning in 2002, which Petitioner and her Parents had held and claimed adversely, since 1959. The Judge further abused his discretion by allowing the Respondents to get by with the taking and destroying of Petitioner's car.

The Respondents argue that Petitioner was in court when the dates were set for a pre-trial Hearing and trial date. However, that was the same Hearing, where Petitioner was totally intimidated by the Judge, who came out into the courtroom, close to the parties' tables, and stated he was not going to recuse, while no transcript was being taken. Petitioner was reasonably shaken, since this Judge doing this had tried to have her put in jail in a prior case in his

prosecutorial capacity, which had just been dismissed by an out-of-town Judge. Petitioner was unaware that actual dates were set to be utilized, when it was confusingly stated, that there would be mediation, with Respondents' attorney never proceeding with it. And it was later stated, by the Court, that indeed, no written notice for the pre-trial Hearing or trial date was sent by the Court as is always customary in Garland County, Arkansas court proceedings.

Respondents further misrepresented the following facts of their **Statement of the Case**;

"i" the time frame of the attempted prosecution of the Petitioner, in relation to when the prosecution, became the Judge in this case.

"ii" the Respondents' statement that "Petitioner's adverse possession was not acknowledged nor documented," was most certainly untrue, demonstrated not only by court documents offered into the record of notarized statements going back to and dated 1981, witness acknowledgments testified to at trial, including the deposition testimony of Respondents' main witness and predecessor, Mrs. Conroy, who fully testified to her knowledge of the Petitioner's constantly maintained adverse possession claim, from 1980 on, as well as Petitioner's own Parents having utilized the property, even <u>before</u> the Respondents' predecessors, had ever moved in, by Petitioner's Parents having used and developed the driveway with gravel as Respondents' main witness testified by deposition, but denied by the Judge, with abuse of discretion, in Petitioner's right to present as her evidence at trial. There was also the

testimony of Respondent McMurtrey himself, acknowledging Petitioner's claim. And there was Petitioner's own testimony in regard to her and her Parents' adverse possession claim from 1959 to the present, which was accepted as valid evidence in the similar Arkansas Appeals Court case of **McLaughlin v. Sicard, 63 Ark. App. 212, 977 S.W. 2d (1998).**

"iii." Respondents statement that there were no extraordinary circumstances necessitating the recusal of the trial judge is false, and was clearly demonstrated to the trial Court by Petitioner's Motion for Continuance of the Trial Date, Motion for New Trial, Renewed Motion to Recuse, and her Motions for Reconsideration, with Affidavits.

"iv." Respondents' statement that "the scenario described by Petitioner of the trial judge coming into the courtroom in his robe close to the parties, looking at the Petitioner, and stating he was not going to recuse did not occur, and that there were no off the record statements by the trial judge at any time,..." was a false statement, and could not be made by the Respondents, since they were not present at that Hearing to know if it happened or not, as the court record indicates, to have witnessed the Judge's questionable actions which took place. And since the McMurtreys are purported to be submitting their reply brief, "*pro se*, they cannot make statements of which they have no knowledge. Also, the court docket supports Petitioner, given the dates of the Judge's filed refusal versus when Petitioner found out. ***Riverside Marine Remanufactureres, Inc. v. Booth*, CA 05-367, Ark. Ct. of App. (Nov. 2005)**

"There is another reason why this

case should be reversed on this issue; the trial courts failure to make a record of the hearing on Riverside's motion *in limine* during which one of the statements at issue was supposedly made. ***Administrative Order # 4*** provides that, "[u]nless waived on the record by the parties, it shall be the duty of any circuit court to require that a verbatim record be made of all proceedings pertaining to any contested matter before it." (emphasis added) ***Arkansas Code Ann § 16-13-510*** **(Repl. 1999).** The Supreme Court has said that it strictly construes and applies ***Administrative Order # 4. Robinson v. State*** **, 353 Ark. 372, 108 S.W. 3d 622 (2003);** ***Bradford v. State*****, 351 Ark. 394, 94 S.W.3d 904 (2003)** emphasizing that a verbatim record of the proceedings is a requirement. Both the supreme court and this court have held that a party's silence on this issue at trial will not be construed as an implied waiver of the verbatim record requirement. ***Robinson, supra; Mattocks v. Mattocks*****, 66 Ark. App. 77, 986 S.W.2d 890 (1999).**"

"v." Respondents' statement that "Petitioner's assertion she was not notified of the trial date,...was present at the time the court set and

announced the trial date and pre-trial date and never disputed that fact," was false. By submitted Affidavit, Petitioner included the circumstances causing her to believe that no pre-trial Hearing date or trial date had been set, since there had been a decision made where Mediation would be attempted instead. The Judge's abuse of discretion was evidenced by every bias ruling going against Petitioner, even though she has no pattern of ever missing a deadline for filing on time or ever being late or absent from any Hearing held, except the one where she had no knowledge of one utilized, with no written notification by the Court, as admitted by the judge of the trial court in the record.

"vi." Respondents' statement that "Motions made by Petitioner were not ruled on because Petitioner was not present to present her motions,..." is false. Petitioner voiced her filed Motions at one Hearing after another, but could not gain rulings, demonstrating further proof of bias and the need for the judge to recuse, instead of just continuing to deny, dismiss, or leave unanswered her written, filed, and oral requests for rulings to her Motions.

"vii." Respondents' statement, that "Petitioner did not request a jury trial under ***Arkansas Rules of Civil Procedure, 38***, is misleading, given the fact, that in the beginning, Petitioner stated her desire for a trial by jury in one of her Court Pleadings. She could not request it under the ***ARCP, Rule 38***, when necessary, because she did not have the required days, before the trial date, to file under that rule, since she was not aware, that a trial date was being utilized. This is

yet another example of a "Catch-22" in this case.

Petitioner further argues with the statements made in **Respondents' Argument;**

Respondents stated, that the state court's failure to reverse on the issue of the judge's refusal to recuse is not in conflict with this Court's prior decisions and does not constitute a denial of Due Process under the Fourteenth Amendment. However, Due Process calls for a fair trial, and Petitioner was denied a fair trial with the refusal of the trial court judge to recuse, which does conflict with this Court's prior decisions, constituting a denial of Due Process under the Fourteenth Amendment.

Respondents again state, in their argument, that "Petitioner describes statements she said the trial judge made in an off the record communication to the parties in the courtroom, and (that) no unrecorded statements were made by the judge."

This was addressed by Petitioner in Respondents' "iv," on Petitioner's Argument P. 4.

Petitioner also submitted a "Bystander's Affidavit," to the Arkansas Court of Appeals of a witness attending that Hearing, who witnessed the Judge come down into the courtroom in his robe and speak to the parties, though he did not hear what was stated by the judge, directed at the Petitioner. That "bystander's affidavit" was filed in the record with Petitioner's Motion to Correct the Record, while on appeal. This was the first court she could ask to address this issue, since she feared confronting the residing judge, and also, because she did not learn, that the judge's

words were not recorded into the transcript of the record, until she received the transcript for appeal. Docket dates support Petitioner.

"Respondents object to the inclusion of claimed events and facts not presented at trial, nor argued on appeal, and which have no bearing to this case or the Petition for Writ of Certiorari other than to cause confusion." Petitioner argues such events were placed inside of Petitioner's "*Reasons why Petitioner's Writ for Certiorari should be granted,*" and those events are central and intertwined creating the necessity for the judge to have recused. They were included to inform of and clarify the circumstances and not submitted to confuse.

Respondents incorrectly pointed out what they want the court to see as "inaccuracies in the statements included in Petitioner's Reasons for Granting the Petition:

"i." Respondents state that "Petitioner alleges a malicious prosecution against her without any documentation or evidence of a malicious prosecution, (and) that no such evidence was introduced at any level of the proceedings."

Petitioner argues, that not only was documentation and evidence of a malicious prosecution submitted, but that Petitioner even submitted a filing from the prior case, which brought up that charge of "malicious prosecution" against her, by the individual who then became judge in the civil case, who refused to recuse.

Furthermore, Petitioner's filings in that prior case was obviously evidence enough to convince an "out-of-town appointed Judge, the Honorable Judge John Cole, to immediately dismiss the case

against her. Petitioner submitted those past filings, in this civil case, as evidence demonstrating more reason, than would be necessary to convince the average observer, that this judge should have, without doubt, recused himself, so Petitioner could have a fair trial.

Petitioner agrees with Respondents argument that, "The fact that a dismissal of the criminal case against Petitioner occurred does not mean the prosecution was malicious." However, Petitioner argues; it was the way the judge, who was then in his prosecutorial capacity, attempted the baseless prosecution, which made it highly questionable and malicious in her opinion. There was no legitimate case against the Petitioner, whatsoever. No facts were stated against her as her doing anything illegal, and yet, the civil judge, then as prosecution, continued to pursue the case, even as dropped and then brought again, against the Petitioner, before the Honorable Judge Cole dismissed charges against Petitioner.

"ii." Respondents argue that Petitioner should not have described facts relating to her work as a counselor.

However, Petitioner was submitting facts, in her *Reasons why her Writ for Certiorari should be granted*, to demonstrate her familiarity with the court system, her credible status as a past counselor of the Garland County Juvenile Court, and facts on how its granting could be useful in helping a broad spectrum of citizens across our country in regard to necessary recusal, which is what she understands was being asked of her.

As for the Respondents' objection "to the document at Petitioner's Appendix 25, being

included in her Petition," Petitioner argues, that Appendix 25, being a letter from the first residing judge over the criminal case to the Court Administrator for the State of Arkansas, stating that all Garland County Judges refused to take the case against Petitioner, and that it was also necessary for him to recuse as well, was made a part of this civil case record, by Petitioner, in giving more reason why this civil court judge should have recused as had been the pattern.

"iii." The "stories" which Respondents argue as "raised for the first time and are not relevant to the issue of bias or lack of bias of the judge in this case," by the Petitioner was submitted in her reasons to grant. Petitioner brought up her medical circumstances in regard to her physical and financial limitations in having to proceed *pro se* in this case, while refusing to allow the stealing of her car or front yard by denial of her rights. She filed an Affidavit, for the record, of a financial statement, though the trial judge falsely stated, she had not submitted an affidavit, further demonstrating his bias against her. The Record itself shows ridicule toward Petitioner by the Judge, as short and demeaning to Petitioner in her presentation of her case, while he was friendly and quite cordial to Respondents.

"iv." The Respondents argue that Petitioner's "allegations regarding anonymous calls from individuals and subsequent cases are not relevant and are mentioned for the first time in this brief.

Petitioner again points out, that she submitted these relevant statements in her *Reasons why her Petition for Writ of Certiorari should be granted,* after she learned her reasons were to indicate

how others would benefit from the questions being reviewed and answered by this court. Petitioner gave reason why granting could assure so many others could avoid having their Due Process rights denied them.

Respondents argue that "In Arkansas a trial judge need not recuse in unrelated litigation simply because he or she prosecuted a party in another case." ***Cooper v.* State, 317 Ark. 485, 490, 879 S.W.2d 405, 408 (1994)**. However, Petitioner submitted evidence of bias and prejudice against her by the trial court judge, which negates that example. Petitioner submitted her Motion to Correct the Record to the Arkansas Court of Appeals, under ***Arkansas Supreme Court Administrative Order #4***, which demonstrated a full violation of Petitioner's Due Process Rights, when a full transcript of the court proceedings were not available, which would have demonstrated, by record and transcript, the prejudicial actions of the judge toward the Petitioner.

"The Supreme Court has explained that "when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from view, and we must presume the process was impaired." ***Vasquez v. Hillery*, 474 U.S. 254, 263, 106 S. Ct. 617, 623, 88 L. Ed. 2d. 598 (1986) (dicta) (citing *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S. Cr. 437, 445 71 L. Ed. 749 (1927)**; see also ***Bolden v. State*, 262 Ark. 718, 720, 561 S.W. 2d 281, 283 (1978)**; "The proper administration of the law requires not only that judges refrain from actual bias but also that they avoid all

appearance of unfairness." **Code of Judicial Conduct, Canon 3 (c) (1972);** "judges should disqualify themselves when their impartiality "might reasonably be questioned."

Respondents argue that; "The reasons for judicial disqualification asserted by Petitioner in this case go to personal bias." Petitioner argues that judicial disqualification was necessary since it involved her right to a fair trial, under Due Process. The judge abused his discretion, given the questionable behavior toward the Petitioner, in the past, and now as Judge in this civil case.

Petitioner argues political and employment gains from the good ole boy system constitute financial gain for the judge to be bias against Petitioner, who does not solely rely on the questionably malicious prosecution of her, but also bias demonstrated by the court record and transcript, as well as the bias in favor of the Respondents, to the point of the judge asking one respondent, if he would like a directed verdict. When the trial judge appears to be representing the Respondents, it is obvious, he has abused his discretion, and his rulings should be overturned.

Respondents argue; "That portion of Petitioner's argument relating to the state court's failure to reverse because her motions were denied is not a basis for certiorari."

Petitioner argues, it is not the fact that the motions were denied which gave cause for reversal, as basis for certiorari. It is the fact, that Petitioner did not have a fair chance under this Judge to have her Motions fairly ruled upon, which ultimately denied her a fair trial by an impartial judge, giving basis for certiorari.

Petitioner points to every one of her Motions being denied, dismissed, or unanswered, as further proof of the perceived and actual bias of this judge's abuse of discretion, denying her a fair trial.

Respondents argue; "That portion of Petitioner's argument relating to the state court's failure to reverse because she claimed the record on appeal was incomplete is not a basis for certiorari."

Petitioner argues, that a full and complete transcript of court proceedings is required under ***Arkansas Supreme Court Administrative Order #4***, which would have served to further prove her case of bias and prejudice by this judge toward her. It all falls under the jurisdiction of this Court under **28 U.S.C. § 1257 (a)**. **(Arg. 5)**

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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